The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N–02–4 OF 2002
GOPAL SRI RAM, AZMEL AND ZALEHA ZAHARI JJCA
26 NOVEMBER 2005

Civil Procedure — Striking out — Action — Whether action against defendants should be struck out — Plaintiff's claim for breach of contract appeared quite strong — Issue of unilateral mistake — Whether pleadings disclosed facts which merit a trial of the action — Rules of the High Court 1980 O 18 r 19

The defendant company owned a golf course. It had contracted supposedly with the first plaintiff by way of a letter dated 30 October 1999 written on a letterhead of 'The Golf Cheque Book' ('the first plaintiff'). However, no such entity as 'The Golf Cheque Book' existed at the date of the contract. It was also in evidence that the first plaintiff made payments to the defendant from time to time. The defendant's case was that it was not aware that the first plaintiff was not in existence at the time the contract was made. After it discovered this fact, it returned the payments made by the plaintiff. A resolution of the first plaintiff's board of directors was passed on 3 March 2000 whereby it was resolved that the plaintiff takes over the product known as 'The Golf Cheque Book' business. The plaintiffs brought an action against the defendant for breach of contract. The High Court struck out the plaintiff's statement of claim. Dissatisfied, the plaintiffs appealed to this court. The issue was the effect in law where a contract was made on behalf of a company that was non-existent when the contract was made.

Held, allowing the appeal:

(1) An application to strike out an action under O 18 r 19 should not descend into a trial on affidavits. What the court is really concerned with is to determine whether the pleading disclosed facts which merit a trial of the action (see para 4).

(2) Learned counsel for the plaintiffs argued that the payments made by the first plaintiff after its incorporation to the defendant was evidence of conduct amounting to ratification. This was certainly a matter that must be looked into in some greater detail by the High Court at trial. So, here, even on the defendant's own case the requirements of s 35(1) of the Companies Act 1965 appeared prima facie to be satisfied. Hence, both on the facts and the law, the first plaintiff's claim for breach of contract appeared to be far from frivolous or vexatious. In fact it appeared quite strong (see para 16).

(3) The issue of unilateral mistake was a very serious point in this case and one that must be thoroughly investigated at the trial. If the trial judge finds that the identity of the person with whom the defendant was seeking to contract with was, objectively speaking, of importance to the defendant, then the contract would, as a matter of law be void for unilateral mistake. But, if there was no

mistake from an objective standpoint then the returning of the monies by the defendant, as pointed out to counsel in the course of argument, was a clear breach of contract. These were other reasons why the plaintiffs' claim could not be struck out and why there must be a trial of the action (see para 17).

[Bahasa Malaysia summary

Syarikat defendan memiliki padang golf. Ia telah memasuki kontrak dengan plaintif pertama melalui sepucuk surat bertarikh 30 Oktober 1999 yang tertera pada kepala surat 'The Golf Cheque Book' ('plaintif pertama'). Namun, tiada entiti bernama 'The Golf Cheque Book' wujud pada tarikh kontrak dimasuki. Dalam keterangan juga menunjukkan bahawa plaintif pertama telah membuat bayaran kepada defendan dari masa ke semasa. Kes defendan adalah di mana tiada kesedaran bahawa plaintif pertama tidak wujud pada masa kontrak dibuat. Selepas fakta ini disedari olehnya, ia telah memulangkan bayaran yang dibuat oleh plaintif. Satu resolusi lembaga pengarah plaintif pertama telah diluluskan pada 3 Mac 2000 di mana ia telah memutuskan bahawa plaintif akan mengambil alih produk yang dikenali sebagai perniagaan 'The Golf Cheque Book'. Plainitf telah memulakan tindakan terhadap defendan kerana perlanggaran kontrak. Mahkamah Tinggi telah membatalkan pernyataan tuntutan plaintif. Berasa tidak puas hati, plaintif telah merayu ke mahkamah ini. Persoalannya adalah kesan undang-undang di mana suatu kontrak dibuat bagi pihak syarikat yang tidak wujud apabila kontrak dibuat.

Diputuskan, membenarkan rayuan tersebut:

(1) Satu permohonan untuk membatalkan satu tindakan di bawah A 18 k 19 tidak boleh dijadikan satu perbicaraan berdasarkan afidavit. Apa yang mahkamah perlu beri perhatian adalah untuk menentukan sama ada pliding mendedahkan fakta yang memeritkan satu perbicaraan berhubung tindakan tersebut (lihat perenggan 4).

(2) Peguam yang bijaksana bagi pihak plaintif berhujah bahawa bayaran yang dibuat oleh plaintif pertama selepas ia ditubuhkan kepada defendan adalah keterangan perlakuan yang membentuk ratifikasi. Ini sememangnya perkara yang perlu diberi penelitian oleh Mahkamah Tinggi semasa perbicaraan. Oleh itu, di sini berdasarkan kes defendan sendiri keperluan s 35(1) Akta Syarikat 1965 kelihatan memuaskan secara prima facie. Justeru itu, berdasarkan fakta dan undang-undang, tuntutan plaintif pertama untuk perlanggaran kontrak kelihatan jauh daripada suatu yang remah dan menyusahkan. Bahkan ia kelihatan kukuh (lihat perenggan 16).

(3) Persoalan tentang kesilapan di satu pihak adalah suatu yang serius dalam kes ini dan perlu disiasat dengan teliti semasa perbicaraan. Jika hakim perbicaraan mendapati bahawa identiti seseorang yang defendan ingin memasuki kontrak bersama adalah, bercakap secara objektifnya, penting kepada defendan, maka kontrak itu akan, dari segi undang-undang menjadi tidak sah kerana kesilapan di satu pihak. Namun, jika tiada kesilapan daripada sudut objektif maka pemulangan wang oleh defendan, seperti mana yang dikemukakan oleh peguam semasa penghujahan, adalah jelas satu perlanggaran kontrak. Terdapat

sebab lain kenapa tuntutan plaintif tidak boleh dibatalkan dan kenapa perlu ada perbicaraan berhubung tindakan itu (lihat perenggan 17).]

Notes

For cases on striking out of action, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2526–2557.

Cases referred to

Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd [1995] 3 MLJ 211 (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)
Cosmic Insurance Corpn Ltd v Khoo Chiang Poh [1981] 1 MLJ 61 (refd)
Cundy v Lindsay (1878) 3 App Cas 459 (refd)
Gwinner v Alberta (Minister of Human Resources and Employment [2002] 116 ACWS (3d) 407 (refd)
Hodgson Bros v South African Railways 1928 CPD 257 (refd)
Kelner v Baxter (1866) 2 CP 174 (refd)
Kennett v Superior Millwork Ltd 125 ACWS (3d) 442 (refd)
MacDougall v Knight (1890) 25 QBD 1 (refd)
Newborne v Sensolid (Great Britain) Ltd [1954] 1 QB 45 (refd)
Thai Hwa Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1996] MLJU 317; [1997] 1 CLJ Supp 418 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)

Legislation referred to

Companies Act 1965 s 35(1)
Companies Act [Sing] s 41
Contracts Act 1950 s 150
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No 22–172 of 2000 (High Court (Civil Division), Seremban)

CK Ng (Patrick Fam with him) (Wong & Associates) for the appellants.
Harmeet Singh (Raja Eleena Siew Ang & Associates) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The plaintiffs (appellants before us) brought an action against the defendant (respondent before us) for breach of contract. The defendant applied to strike out the statement of claim on the ground that the first plaintiff was not privy to the contract as asserted by the plaintiffs. It also delivered a defence and counterclaim. The High Court granted the defendant's application and struck out the statement of claim. The counterclaim was directed to be separately tried. The trial of the counterclaim is set for hearing and disposal on 11 January 2006. Dissatisfied with the High Court's order of striking out the statement of claim the plaintiffs appealed to this court. We heard this appeal on 21 November 2005 and allowed it. We did not give reasons at

A once. Ordinarily a case such this would not warrant a judgment because the principles governing applications to strike out a pleading are trite and each case really turns on its own peculiar facts. But this case has a company law dimension to it which is of interest to the legal profession. So, a judgment is called for. The facts are fairly straightforward.

B

[2] The defendant company owns a golf course. Members of the public have to pay a fee to play on the course. The second plaintiff was the sole proprietor of a firm called LH Wong & Associates. There is no dispute that there is a contract and that it is evidenced by a letter dated 30 October 1999. That letter was written on a letterhead that read 'The Golf Cheque Book'. It was a term of the contract that a sum C of RM80,000 was to be paid to the defendant. In return the defendant was to allow persons producing golf cheques issued to them by the firm to use the course. The letter in question was signed on the defendant's behalf accepting the terms. It was also signed by one Md Ibrahim A Karim under whose signature appear the typewritten words 'for The Golf Cheque Book'. It is common ground that no such entity as 'The D Golf Cheque Book' existed at the date of the contract. In fact, a private limited company called The Golf Cheque Book Sdn Bhd, that is to say, the first plaintiff was incorporated only on 23 March 2000, some five months after the contract was made. It is also in evidence that the first plaintiff made payments to the defendant from time to time. The defendant's case is that it was not aware that the first plaintiff was not in existence at the time the contract was made. After it discovered this fact, it E returned the payments made by the plaintiff. For completeness, I must mention that a resolution of the first plaintiff's board of directors was passed on 3 March 2000 whereby it was resolved that the plaintiff takes over the product known as The Golf Cheque Book business from the firm.

F **[3]** The issue whether there was a valid, binding and enforceable contract between the first plaintiff and the defendant turns upon the interpretation of the facts surrounding the making of the contract and the application of s 35(1) of the Companies Act 1965. In my judgment, the first is a question that may require viva voce evidence. At any rate, both the first and the second call for careful and mature G argument and judicial consideration. At the invitation of the defendant, the learned judge appears to have undertaken a microscopic examination of the facts and made specific findings upon the material presented to him. In short, there appears to have been a trial on affidavits before him. This in my very respectful view is an incorrect approach in a case as the present. My reasons for this view now follow.

H **[4]** An application to strike out an action under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') should not descend into a trial on affidavits. What the court is really concerned with is to determine whether the pleading discloses facts which merit a trial of the action. There is a surfeit of authorities on the point and I need only cite one. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking* I *Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court said this:

> The principles upon which the court acts in exercising its power *under any of the four limbs of O 18 r 19(1) of the RHC* are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, and this summary procedure can

only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* [1892] 3 Ch 274). *It cannot be exercised bv a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence* (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

[5] But this, like many rules of practice is not absolute. It does not, for example, apply to cases where a plaintiff is abusing the process of the court, for example, by filing two writs for libel, one for each passage appearing in the same publication (see *MacDougall v Knight* (1890) 25 QBD 1 at p 10, per Fry LJ). Another instance is where there has been a history of previous litigation with an attempt by a plaintiff to re-agitate issues that were either raised and dealt with, or ought reasonably to have been raised, in an earlier suit. In such cases, the court is entitled, and indeed under a duty, to carefully scrutinise the factual background to ensure that the second action that is being sought to be struck out is not an abuse of the court's process. *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 was such a case. There, Lord Diplock said:

The question that it raises is whether an action (herein called 'the new action') brought by the respondent against the appellant in the High Court in Borneo by a writ and statement of claim dated 16 May 1972 ought to be summarily dismissed as frivolous and vexatious. The principal relief sought in the new action was to set aside a judgment entered against the respondent on 27 December 1969 in a previous action (herein called 'the old action') between the same parties for the sum of $718,266.85, due under an agreement of 21 November 1968. The appellant's application to set aside the writ and all subsequent proceedings in the new action was based on the inherent jurisdiction of the court to prevent abuse of its process. Affidavit evidence was adduced by each party. Upon consideration of this evidence the High Court (Lee Hun Hoe J) was satisfied that the new action was frivolous and vexatious and brought 'to defeat the course of justice in the hope of delaying the execution of a judgment', sc. in the old action. He, accordingly, set aside the proceedings.

Upon appeal from the High Court in Borneo, the Federal Court of Malaysia appear to have treated the appellant's application as if it had been made only under O XXV r 4, and not under the inherent jurisdiction of the court. They considered that the statement of claim raised triable issues and regarded themselves as precluded from examining the evidence for the purpose of determining whether it was an ineluctable inference from facts in evidence which were undisputed, that the new action was bound to fail.

The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the statement of claim alone, their Lordships would have been loath to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the statement of claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it

A necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the new action could not possibly succeed.

[6] The present instance is, of course, not one where there is a history of previous litigation. So no issue of an abuse of the court's process arises. It therefore comes B within the general principle adverted to by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*. And so I come to the vital question: is this a case which is frivolous or vexatious? In my view it does not. There are here issues of fact and law that require investigation and mature consideration after hearing full argument.

C

[7] Let me take the facts first. The defendant's case is that at all material times when the second plaintiff dealt with the defendant, the former was contracting on behalf of the non-existent first plaintiff. Learned counsel for the defendant says that once the learned judge found this to be so on a reading of the documents, the doctrine of privity came into operation. Apart from saying that I must be forgiven for finding D this argument wholly incomprehensible, there are some observations that I would make.

[8] The doctrine of privity of contract applies where parties to a contract purport to confer a benefit or to impose a burden on a third party. In that fact pattern the E third party cannot sue on the contract to recover the benefit. Nor may either party to the contract seek to make the third party liable on the obligations imposed upon him or her by them. But it is central to the doctrine of privity of contract that the parties to the contract are contracting on their own behalf and not as the agent of some third party, be that third party a disclosed or an undisclosed principal. Because it is a well established principle that agency is an exception to the privity doctrine. F

[9] Now for the law. The real issue in this case is the effect in law where a contract is made on behalf of a company that was non-existent when the contract was made. The position at common law is illustrated by *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45 where the facts were these. The promoter and prospective director G of a limited company, Leopold Newborne (London) Ltd, which had not been registered at the material time entered into a contract for the supply of goods to the defendants. The contract was signed: 'Leopold Newborne (London) Ltd' and the plaintiff's name, 'Leopold Newborne', was written underneath. The plaintiff sued the defendant for breach of the contract. It was held that the contract had been made H with the non-existent company and was therefore void for want of competent parties. The contract could not be adopted by the plaintiff. Nor could he sue on it. Lord Goddard CJ said:

> What we cannot find in this case is that Mr Newborne ever purported to contract to sell as agent or as principal. The contract was one which he was making for the company, and I although Mr Diplock has argued that in signing as he did Mr Newborne must have signed as agent, since the company could only contract through agents, that was not really the true position. The company makes the contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company's contract is authenticated by the signature of one of the directors. This contract purports to be a

contract by the company; it does not purport to be a contract by Mr Newborne. He does not purport to be selling his goods but to be selling the company's goods.

[10] It is a principle of the law of agency that a principal may ratify the acts of his agent. That principle is housed in our s 149 of the Contracts Act, 1950 which reads as follows: Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown the acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

[11] But it is a precondition of ratification that the principal must have been in existence when the contract was made. That common law rule was laid down in the seminal case of *Kelner v Baxter* (1866) 2 CP 174. When applied in the environment of company law the principle is that:

A company cannot ratify a contract made for its benefit before it was formed; nor can it adopt such contract by resolution. A new agreement on identical lines is necessary. The result may sometimes be unfortunate, but follows logically from an application of the doctrine that a principal not in being at the date of an agreement, and therefore not in a position to be bound by it then, cannot ratify it thereafter' (per Innes CJ in *Mccullogh v Fernwood Estate Ltd* [1920] AD 204).

[12] In *Thai Hwa Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1996] MLJU 317; [1997] 1 CLJ Supp 418, Suriyadi Halim Omar J summed up the position at common law as follows:

Contracts entered into prior to a company's registration at common law could be completely null and void unless the person or persons signing on behalf of the company were the real principals (*Newborne v Sensolid (Great Britain) Ld* [1954] 1 QB 45). Though, however, '... in some circumstances a company may acquire rights or incur liabilities at law or equity in respect of a transaction originally entered into before the incorporation of the company. Broadly speaking, for a company to be so liable it must enter into a new contract after it has been incorporated.' (*Chitty on Contracts* (25th Ed) Vol I General Principles).

[13] As you can see, the common law could and did produce illogical and unjust results. The Companies Act 1965 ('the Act'), unlike its precursors, addressed this issue. By s 35(1) it provided as follows:

Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.

[14] In *Cosmic Insurance Corpn Ltd v Khoo Chiang Poh* [1981] 1 MLJ 61, the udicial Committee of the Privy Council had occasion to consider the former s 35(1) (now s 41) of the Singapore Companies Act. Lord Roskill when delivering the advice of the Privy Council said of the Singapore provision:

Their Lordships note three things about this subsection. First, so far as presently relevant before s 35(1) can be successfully invoked the alleged 'contract or other transaction' must

purport to have been entered into 'by any person on behalf of a company prior to its formation'. Secondly, it is only after that first condition is satisfied that such a contract 'may be ratified by the company after its formation...'. Thirdly, it is only if both those conditions are satisfied that such a contract upon such ratification is ante-dated to the date when it first purported to have been made.

[15] I would note a fourth and fifth thing about s 35(1). Fourth, it reverses the common law on the subject and is therefore remedial. Hence, it must receive 'a fair, large and liberal construction that gives effect to the statute's legislative purpose' (per Perras J in *Kennett v Superior Millwork Ltd* 125 ACWS (3d) 442). Or, to put it in slightly different language, the subsection 'ought to be expansively interpreted to give effect to the purposes of the Act,' (*Gwinner v Alberta (Minister of Human Resources and Employment* [2002] 116 ACWS (3d) 407 per SJ Greckol). Fifth, the subsection uses the phrase 'ratified by the company' without specifying any particular manner in which the ratification may take place. In *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211, the High Court considered s 35(1) in the context of a resolution that had been passed by the company adopting the pre-incorporation contract in that case. There are passages in the judgment in that case which are certainly open to the interpretation that ratification must be done by way of a formal resolution. If that indeed be the suggestion, then it would be incorrect as such an approach to interpretation would cut across the legislative purpose of enacting the section. Further, there is s 150 of the Companies Act 1965 which reads: Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

[16] Before us, learned counsel for the plaintiffs argued that the payments made by the first plaintiff after its incorporation to the defendant is evidence of conduct amounting to ratification. This is certainly a matter that must be looked into in some greater detail by the High Court at trial. So, here, even on the defendant's own case the requirements of s 35(1) appear prima facie to be satisfied. Hence, both on the facts and the law, the first plaintiffs claim for breach of contract appears to be far from frivolous or vexatious. In fact it appears quite strong.

[17] There is another matter. It has to do with the argument of learned counsel for the defendant in response to the appeal. To recall, he said that the moment his client became aware that the first plaintiff had not been in existence at the time of the making of the contract, it returned to the plaintiff the monies received under the contract. This, said counsel, is because the defendant would never have entered into the contract if it had known that the first plaintiff did not exist. This issue, namely, unilateral mistake, is a very serious point and one that must be thoroughly investigated at the trial. If the trial judge finds that the identity of the person with whom the defendant was seeking to contract with was, objectively speaking, of importance to the defendant, then the contract would, as a matter of law be void for unilateral mistake (see *Cundy v Lindsay* (1878) 3 App Cas 459). But, if there was no mistake from an objective standpoint then the returning of the monies by the defendant, as pointed out to counsel in the course of argument, a clear breach of contract. These are other reasons why the plaintiffs' claim cannot be struck out and why there must be a trial of the action.

[18] I have in paragraph 17 used the expression 'objectively speaking'. I have used it advisedly. Because the test in the law of contract is always objective. And I can do no better than to quote from Acting Judge President Benjamin in *Hodgson Bros v South African Railways* 1928 CPD 257: If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he intended to agree to the other party's terms.

[19] For the reasons already given, the appeal was allowed. The orders of the High Court were set aside and the writ was ordered to be returned to file. The defendant was ordered to pay the costs of the appeal and those incurred in the court below. We remitted the case to the High Court and directed that the plaintiff's action be tried with the counterclaim on 11 January 2006.

[20] My learned brother Azmel and my learned sister Zaleha Zahari JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Loo Lai Mee